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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SEARIVER MARITIME, INC.,
Petitioner,
v.
EXXON SEAMEN'S UNION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE, INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of this Court, the Institute for a Drug-Free Workplace ("the Institute"), by its undersigned counsel, hereby moves for leave to file its brief as an *amicus curiae* in support of Petitioner, SeaRiver Maritime.* In support of its Motion, the Institute states:

The Institute is a non-profit coalition of private businesses and business organizations dedicated to preserving the interests of employers and employees in effective and responsible drug-abuse prevention programs. In this regard, the Institute disseminates information to assist in the development of corporate drug-abuse prevention and treatment programs, and attempts to positively influence

*** Prior to filing this Motion, the Institute sought the consent of both parties to the filing of its brief, as required by the Court's rules. The Petitioner consented to the Institute's request, but the Respondent refused consent, necessitating this motion.**

the development of the law on workplace substance-abuse prevention throughout the United States. The Institute has developed an enormous amount of information on current laws, regulations, policies, and workplace practices regarding substance-abuse prevention. In addition, the Institute has extensive resources on the successes and failures of workplace substance-abuse programs and what measures have proven effective.

The Institute believes that its *amicus curiae* participation will benefit the Court in this proceeding. The Institute and its members bring a unique "hands-on" perspective to the consideration of the efficacy and value of meaningful drug-testing programs. Its members have implemented such policies and applied them to sizable portions of the nation's work force and, thus, have substantial experience with the benefits of effective programs. Accordingly, the Institute and its members have an important perspective on the critical policy issues involved in this case which the Court should consider.

WHEREFORE, the Institute requests that the Court grant its motion and permit it to file the accompanying brief as an *amicus curiae*, in support of the Petitioner.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The Institute for a Drug-Free Workplace (the "Institute") is a non-profit coalition of major businesses and business organizations dedicated to preserving the interests of employers and employees in effective and responsible drug-abuse prevention programs. The Institute includes in its membership six of the ten largest companies in the United States, nearly half of the "Fortune 50," approximately 70 of the "Fortune 200," and a wide range of chambers of commerce, trade associations, and community coalitions representing businesses of all sizes.

Among other functions, the Institute disseminates information intended to assist employers and employees in corporate drug-abuse prevention and treatment programs, and to positively influence the national, state, and local consideration of drug-abuse prevention issues. The Institute, therefore, is uniquely situated to provide relevant and helpful information on the nature and dangers of alcohol and drug abuse, and on the design and implementation of effective policies and procedures to combat those problems in the workplace, particularly where such policies promote the safety and welfare of employees, co-workers, and the public at large.

The Institute has a significant interest in the questions presented in this case. By holding that an employer may be required to return an employee suspected of illicit drug abuse to a safety-sensitive position after he refused to submit to a requested drug test, the Court of Appeals ignored the risk that such an employee could cause or contribute to an accident, and the potentially catastrophic consequences. The decision therefore unfairly limits employers' ability to provide a safe workplace, and to take steps to protect life, property, and the environment.

The Institute's members have a strong interest in ensuring that their drug-free workplace policies cannot be evaded by employees who refuse to submit to a drug test without consequence. Mandatory reinstatement of a safety-sensitive employee legitimately suspected of drug abuse who refuses to submit to testing—if left undisturbed by this Court—would provide a "road map" to illicit drug users on the best strategy to avoid the employment ramifications of improper and dangerous conduct.

Moreover, such a policy would give drug abusers an escape hatch from enforcement of company drug-free workplace policies, would undermine the very basis of these policies, and—by putting those known or strongly suspected of being drug abusers back in critically safety-sensitive jobs—could directly and substantially precipitate human, economic, and environmental catastrophes.

INTRODUCTION AND SUMMARY

The Institute agrees with the Petitioner that the Third Circuit's decision to uphold the arbitrator's award reinstating Alan Cash violates the well-established public policy against allowing drug-impaired employees to work in safety-sensitive positions. That public policy—grounded in concerns relating to public, environmental, and workplace safety—is of overriding importance, and requires that the Court of Appeals' decision be reversed.

Petitioner's employee, Mr. Cash, worked as a pumpman on an ocean-going oil tanker, which is a safety-sensitive position subject to drug testing under both U.S. Coast Guard and Petitioner's rules. He refused to submit to a drug test after an inspection revealed evidence of marijuana in his room and suitcase. *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1289-90 (3d Cir. 1996) (Exxon III). Mr. Cash was terminated for failure to submit to the requested test, but ordered reinstated by an arbitration panel which, using a "clear and convincing evidence" standard, found that Petitioner did not have sufficient cause to require a drug test. *Id.* at 1290. Petitioner filed an appeal from this award in the U.S. District Court for the District of New Jersey, which affirmed and enforced the arbitration ruling. Petitioner appealed that decision to the United States Court of Appeals for the Third Circuit, which affirmed the District Court's decision.

Significantly, the Court of Appeals *agreed* with Petitioner that reinstatement of an employee who refuses to submit to a drug test upon a showing of reasonable cause violates public policy. *Id.* at 1295. Nevertheless, the court refused to overturn the arbitrators' decision, noting the conflicting policy in favor of judicial deference to arbitration decisions. *Id.* at 1297.

The safety concerns that motivated the widespread adoption of workplace drug-testing policies, particularly

for employees working in safety-sensitive positions in the petrochemical industry, are the essential foundation for a broad public policy against reinstating to a safety-sensitive position any employee who has refused, for whatever reason, to submit to a drug test. Reinstatement to a regulated, safety-sensitive position destroys public policy by undermining multiple, compelling safety interests. In addition, such a conclusion clearly violates public policy by undercutting every requirement that lawmakers and employers have adopted to ensure that employees who abuse drugs or alcohol are not employed in these positions. Despite this well-defined and strong policy against permitting those under the influence of illegal drugs or alcohol to engage in safety-sensitive work, the Third Circuit's decision encourages employees who believe they might test "positive" to refuse to submit whenever a "for-cause" test is requested, thereby defeating the very purpose of "for cause" testing and subverting its deterrence and detection impacts. For these reasons, the Institute urges this Court to grant the petition for a writ of certiorari, and to reverse the decision of the Court of Appeals.

ARGUMENT

I. A WELL-DEFINED AND DOMINANT PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS.

A. Each branch of the federal government repeatedly has enunciated a public policy that seeks to prevent drug- or alcohol-impaired employees from working in safety-sensitive positions.

A clearly defined and dominant public policy supports the removal of potentially drug- or alcohol-impaired workers from safety-sensitive positions. This policy has been expressed explicitly through Presidential actions, federal statutes, and a large volume of federal regulations.

The policy against employing substance abusers in safety-sensitive positions has been incorporated into fed-

eral law on several levels. Executive Order 12,564, issued by President Reagan, mandated that the heads of all executive agencies of the federal government establish a drug-free workplace. Congress enacted the Drug-Free Workplace Act, 41 U.S.C. app. § 701 *et seq.* (1994), which requires all federal contractors to establish a drug-abuse prevention program including education, counseling, and penalties for drug use. 41 U.S.C. app. § 702(a) (1994).

The U.S. Department of Transportation (DoT) and five operating agencies under its control established mandatory substance-abuse prevention requirements. The Federal Aviation Administration (FAA), the U.S. Coast Guard (USCG), the Federal Railroad Administration (FRA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA) promulgated detailed regulations in this area, all of which reflect the fundamental policy judgment that no drug- or alcohol-impaired employees should work in safety-sensitive positions in transportation operations.[1] The strong public policy behind these DoT regulations was definitively underscored by Congress in its enactment (by wide vote margins in both the Senate and the House of Representatives) of the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. app. § 2717 (1994).

Outside the transportation sector, the Departments of Energy (DoE) and Defense (DoD) also have promulgated regulations to ensure that safety-sensitive jobs are only performed by unimpaired individuals. DoE and DoD contractors must have programs to identify illegal drug users, including testing of employees in sensitive positions —that is, positions that pose dangers to public health

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[1] *See* 14 C.F.R. Part 121, Appendix I (1994) (FAA); 46 C.F.R. Part 16 (1994) (USCG); 49 C.F.R. Part 219 (1995) (FRA); 49 C.F.R. Part 382 (1995) (FHWA); 49 C.F.R. Part 653 (1994) (FTA).

and safety. 10 C.F.R. Ch. III, § 707.5(a)(1) (1994), 48 C.F.R. § 252.223-7004(c)(4)(i) (1994).[2]

There also is substantial precedent in the federal courts recognizing this public policy. This Court, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), confirmed the public policy against allowing impaired employees to work in safety-sensitive positions. In *Skinner*, the Court held that in light of the great potential harm that drug- or alcohol-impaired employees may cause in the railroad industry, railroad employees could be required to undergo drug and alcohol testing. Similarly, in *Von Raab*, the Court held that Customs employees who carry firearms could be subject to mandatory drug testing because of the dangers which substance-abuse impairment would pose for agents in their positions.

The Fifth, Ninth, First, and Third Circuit Courts of Appeals have considered whether public policy prevents the reinstatement of drug- or alcohol-abusing employees to safety-sensitive positions. Each of them has concluded that public policy strongly militates against such results.

For example, the Fifth Circuit has held that an otherwise valid arbitrator's award that ordered reinstatement of a drug-abusing employee in a safety-sensitive position, conditioned on passing a drug test, violated public policy. *Gulf Coast Industrial Workers Union v. Exxon Co. USA*, 991 F.2d 244, 249 (5th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 441 (1993). The court noted, "[t]here are countless statutes, regulations, company guidelines, and judicial decisions that pronounce the emphatic national desire to eradicate illicit drugs from the workplace." *Id.*

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[2] *See also* 48 C.F.R. Part 1852 (1994) (National Aeronautics and Space Administration Drug Testing requirements for contractors); 10 C.F.R. Part 26 (1994) (Nuclear Regulatory Commission contractors testing requirements for nuclear plant employees.)

More recently, the Fifth Circuit broadened the scope of its decision to recognize the preemptive effect of the public policy against allowing drug- or alcohol-impaired employees to occupy safety-sensitive positions. It ruled that an arbitrator's award of back pay or reinstatement of an employee who tested "positive" for cocaine while employed in a safety-sensitive position, even where reinstatement would involve placement in a non-safety-sensitive job, also undermines public policy. *Exxon Corp. v. Baton Rouge Oil and Chemical Workers Union*, 77 F.3d 850 (5th Cir. 1996).[3]

Of course, as Petitioner notes, the Third Circuit also has specifically recognized a dominant public policy forbidding the reinstatement of employees who have tested "positive" to safety-sensitive positions. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) (Exxon II); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) (Exxon I). Nonetheless, in the decision at issue, the court placed primary emphasis on the issue of *how* the employee, Alan Cash, came to be asked to submit to a test, rather than the fundamental value and objectives of the testing policy itself.

In summary, every court which has considered the issue has agreed that an arbitrator's discretion on issues involving employee drug or alcohol abuse is circumscribed by the public policy against permitting safety-sensitive employees to engage in illicit drug and alcohol use.

B. The states have recognized that public policy forbids employment of drug- or alcohol-abusing employees in safety-sensitive positions.

A vast majority of the states also have recognized this public policy in one form or another. State legislatures

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[3] *See also, United Food & Commercial Workers v. Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1995); *Delta Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 665 (1st Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

have enacted laws on drug-free workplaces, limitations on benefits, and workplace drug testing.

State unemployment compensation and workers' compensation laws also evidence this well-defined and dominant public policy against allowing impaired employees in the workplace. More than 20 unemployment compensation statutes explicitly deny unemployment benefits to workers who were dismissed due to alcohol or drug use.[4] In the absence of an explicit statutory provision, unemployment commissions in many other states faced with a worker dismissed for drug or alcohol use also have denied claims for unemployment benefits.[5]

Similarly, 39 states have enacted explicit statutory limitations on the receipt of workers' compensation benefits by an employee who is injured due to drug or alcohol use.[6] In the absence of statutory provisions for automatic denial of benefits, state courts also have denied intoxi-

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[4] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 23-619.01 (1993) and 23-775 (1993) (benefits are denied to an employee who is discharged for willful misconduct which includes failure to pass or refusal to take a drug or alcohol test); ARK. CODE ANN. § 11-10-514(b) (Michie 1994) (benefits denied to employee discharged for reporting to work under the influence of alcohol or controlled substances); FLA. STAT. §§ 443.101-2 (West 1995) (benefits denied if discharge due to drug use; a "positive" drug test creates a rebuttable presumption of drug use); N.Y. LAB. LAW § 592 (McKinney 1993) (disqualification from benefits may result if person in safety-sensitive position tests "positive" for drug or alcohol use); OKLA. STAT. tit. 40, § 2-406A (1994) ("positive" test or refusal to test under program in compliance with state law disqualifies employee from benefits).

[5] *See, e.g., Dolan v. Svitak*, 527 N.W. 2d 621 (Neb. 1995); *Warren v. Employment Security Department*, 724 P.2d 227 (N.M. 1986); *Clevenger v. Employment Security Department*, 770 P.2d 866 (Nev. 1989); *Farm Fresh Dairy v. Blackburn*, 841 P.2d 1150 (Okla. 1992).

[6] *See, e.g.*, ME. REV. STAT. ANN. tit. 39-A, § 202 (West 1993) (no benefits if intoxicated when injury occurred, *unless* employer knew employee was intoxicated at the time of the injury or knew the employee had a habit of coming to work intoxicated); N.Y. WORK. COMP. LAW § 10 (McKinney 1993) (benefits denied if

cated employees these benefits.[7] While these statutes and rulings vary by state, the policy is manifestly clear in each case: employees should not be permitted to recover compensation when they intentionally endanger themselves and others by using drugs and alcohol.

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO REFUSE DRUG TESTS IS A NECESSARY COROLLARY OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO PUBLIC, WORKPLACE, AND ENVIRONMENTAL SAFETY.

A. Reinstatement violates public policy because it encourages employees to refuse drug or alcohol tests and undermines the ability of drug-testing programs to identify drug abusers.

If a worker is allowed to refuse a drug test without facing sanctions at least as severe as those for a "positive" drug test, all employees who would test "positive" for drugs simply will refuse the test and accept a lesser sanction. This result effectively would condone drug use, and thereby endanger the employee, his or her co-workers, the public, and the environment. A lesser sanction for a refusal-to-test destroys the effectiveness of drug-testing programs. The federal and state governments, and other courts, have recognized this problem, and treat a "refusal-to-test" in a similar fashion to a "positive" test result.

The federal agencies recognize the futility of a drug-abuse prevention program that does not at least provide

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injury is caused solely by use of controlled substances); PA. STAT. ANN. tit. 77 § 431 (Supp. 1995) (benefits denied if injury caused by intoxication or use of illegal drugs); R.I. GEN. LAWS § 28-33-2 (1986) (benefits denied if injury caused by intoxication or use of illegal drugs).

[7] *See, e.g., Banks v. Dep't of Educ.*, 462 S.W.2d 428 (Ky. 1971); *Nekoosa-Edwards Paper Co. v. Indus. Com.*, 141 N.W. 1013 (Wis. 1913). Both cases predate current statutes disqualifying intoxicated employees from collecting benefits.

identical sanctions for a "positive" test result and a refusal-to-test. Consequently, in virtually every instance, the federal government has equated a refusal-to-test with a "positive" test result for determining of sanctions.

All the DoT regulations equate a refusal-to-test with a "positive" test result. For example, the FAA regulations provide that no person can be employed in a safety-sensitive position who has failed *or* refused to submit to a drug test, 14 C.F.R. Ch. I, § 121.455(c) (1994), unless it is subsequently determined that he or she is fit for duty. 14 C.F.R. Ch. I, § 121.455(d) (1994). Similarly, the USCG regulations provide that an individual holding a license, certificate of registry, or merchant mariner's document who refuses to submit to a test under the regulations will be subject to suspension and revocation proceedings. 46 C.F.R. § 4.06-5(c) (1994). Additionally, the concern that drug-using individuals are the most likely to refuse a test led the USCG to provide that *all* individuals, including the grievant in this case, who refuse to be tested *must* be removed from any duties which directly affect the safety of a vessel's navigation or operations. 46 C.F.R. § 4.06-5(c) (1994). *See also* 49 C.F.R. §§ 219.603(b), 219.213, 219.505, 219.605(e) (1994) (FRA sanctions for refusal to provide a sample); 49 C.F.R. §§ 391.117(a) to 391.117(b) (1994) (FHWA disqualifications); 49 C.F.R. § 653.9(a)(1)(iii) (1994) (FTA regulations); 10 C.F.R. Ch. I, § 26.27(c) (1994) (NRC requirements).

Many states also have recognized the necessity of equating a refusal-to-test with a "positive" test result. Of the nine states whose laws specifically address the subject, three explicitly equate a refusal-to-test with a "positive" test result,[8] and six allow the employer to determine the

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[8] MISS. CODE ANN. §§ 71-7-1 to -31 (1993) (refusal-to-test for pre-employment test is valid basis for refusal to hire; posted policy must state consequences of refusal-to-test); OKLA. STAT. tit. 40, §§ 551-565 (1994) (a confirmed "positive" test or a refusal-to-test is valid

sanctions for a refusal-to-test.[9]

Several state unemployment compensation laws also reflect the public policy against permitting a person who has refused a drug test to obtain benefits through the statutory mechanism.[10] In states without an express statutory provision, this policy is reflected in case law through the denial of unemployment benefits because of an applicant's refusal to submit to a drug test. The courts and unemployment compensation commissions routinely deny benefits for terminations triggered by employee refusals to test, holding that such refusals constitute "gross" or "willful" misconduct sufficient to justify disqualification from eligibility. *See, e.g., Farm Fresh Dairy v. Blackburn*, 841 P.2d 1150 (Okla. 1992) (collecting cases). Similarly, several state workers' compensation laws evidence the public policy against allowing a worker who refuses a drug test to receive less severe sanctions than a worker who receives a "positive" test result.[11]

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basis for refusal to hire; posted policy must state consequences of refusal-to-test); UTAH CODE ANN. §§ 34-38-1 to -15 (1993) (refusal to submit to test, like a "positive" test result, allows the employer to suspend, discharge, or discipline the employee, or deny employment to a job applicant).

[9] 1995 Ala. Acts 535 (employer must give notice of consequences of refusal-to-test); FLA. STAT. ANN. § 627.0915 (West 1993) (employer must post consequences of refusal-to-test); GA. CODE ANN. §§ 34-9-410-420 (Michie 1993) (must post consequences of "positive" test result or refusal-to-test); ME. REV. STAT. ANN. tit. 26 §§ 618-690 (West 1993) (employer must advise employees of consequences of refusal); MINN. STAT. §§ 181.950-957 (1993) (employer must advise employees of consequences of refusal); 1996 Wash. Legis. Serv. 127 (West) (effective June 6, 1996) (employer may terminate employees for refusing a test).

[10] *See, e.g.*, CONN. GEN. STAT. § 31-236 (1992) (benefits denied to an employee who is discharged for violating employer drug policy if policy is established in accordance with Connecticut law); LA. REV. STAT. ANN. §§ 23:1601 (West 1992) (refusal-to-test is considered grounds for denial of compensation).

[11] *See e.g.*, ALA. CODE § 25-5-51 (1993) (injured employee who refuses test is denied benefits); FLA. STAT. ANN. § 440.101 (West

The many decisions issued by federal and state courts in cases alleging wrongful discharge and similar common-law torts also highlight the strong public policy against reinstatement of employees who refuse drug tests. *See, e.g., Baggs v. Eagle-Picher Industries, Inc.*, 957 F.2d 268 (6th Cir. 1992), *cert. denied*, 506 U.S. 975 (1992) (no cause of action for discharge following refusal-to-test); *Monroe v. Consolidated Freightways, Inc.*, 654 F. Supp. 661 (E.D. Mo. 1987) (discharge for refusal upheld); *Luedtke v. Nabors Alaska Drilling*, 834 P.2d 1220 (Alaska 1992) (employees may submit to test or refuse and resign); *Folmsbee v. Tech Tool Grinding and Supply, Inc.*, 630 N.E.2d 586 (Mass. 1994) (discharge for refusal-to-test upheld); *Gilmore v. Enogex, Inc.*, 878 P.2d 360 (Okla. 1994) (interest in drug-free workplace justifies termination for failure to test).

B. Employers with strong and effective drug-testing programs properly treat a "refusal to test" at least as severely as a "positive" test result.

For a drug-testing program to be effective, there have to be severe sanctions which employees *know* will result if they violate the policy. A drug-testing program in which an employee can avoid the consequences of a "positive" test result by *refusing* a drug test is essentially worthless. Such a policy would destroy the effectiveness of workplace drug-testing programs. Detection abilities are irrelevant when an employee can refuse a test. Deterrence—including the fear of being caught—is destroyed when employees know they can avoid the consequences of a "positive" test by simply refusing to submit.

A recent survey of the Institute's members demonstrated that American employers have adopted policies that equate a "refusal-to-test" with a "positive" test result—or as insubordination. Of 51 Institute members who re-

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1993) (refusal to test leads to presumption that employee impaired and ineligible for medical and indemnity benefits).

sponded to the survey question "Does your company equate an employee's or a job applicant's refusal to be drug tested with a confirmed drug-test "positive" for adverse employment action purposes?," 45 answered "yes." The remaining six respondents stated that a drug-test refusal is treated more severely than a "positive" drug-test result. In the words of one member, "If there are no consequences to a refusal to be tested, then there is no program to keep substance abusers out of the workplace." [12]

Thus, the experience of private sector employers confirms the judgment of regulators that a comprehensive drug-testing program which equates a refusal-to-test with a "positive" test result is a necessary and efficient means of preventing harmful accidents. Each successful workplace program confirms that drug and alcohol testing help achieve the public policy goals expressed through the numerous federal and state expressions of public policy.

To permit refusals-to-test to *not* trigger the same adverse employment action as a "positive" test result is to render the drug-testing program meaningless—no one who *could* test "positive" would agree to a test and the "positive" rate likely would be 0.0 percent. The effectiveness of drug testing and workplace substance-abuse programs should not be crippled by permitting a refusal-to-test to carry no sanction or a lighter sanction than a "positive" test result.

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[12] Institute for A Drug-Free Workplace. *"Member Survey: Workplace Policies Regarding a Refusal-to-Test."* Washington, D.C. (May 1996).

C. Reinstatement of employees who refuse drug or alcohol tests violates public policy because it drastically interferes with employer efforts to avoid the placement in hazardous positions of employees who abuse illegal drugs or alcohol.

Employers with safety-sensitive operations hire from a population in which nearly three-quarters of America's illicit drug users are employed. The U.S. Department of Health and Human Services estimates that one out of every four Americans is directly affected by the alcohol or drug dependency of a family member, friend, or co-worker.[18]

Companies with employees who perform safety-sensitive tasks must be able to decrease the likelihood of accidents which have substantial—and sometimes tragic—human, economic, and environmental costs. In addition, these companies have a statutory duty to ensure safe and healthy workplaces for all of their employees. 29 U.S.C.A. § 654 (a)(1) (1985). Furthermore, employers are liable in tort to individuals who suffer personal injury and/or property damage as a result of an accident. Where catastrophic events occur as the result of the drug or alcohol use of employees in safety-sensitive positions, the financial consequences can be staggering. Thus, companies clearly need to be able to reduce the likelihood of accidents, not only because of the severe economic burden that the company would face in the wake of such an accident, but also because of the human suffering and harm that would befall society.

Drug and alcohol use substantially impact workplace safety. For example, drug-using employees were found to be 3.6 times more likely to be involved in a workplace accident than are employees who do not use drugs. Thomas E. Backer, *Strategic Planning for Workplace*

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[18] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1994 National Household Survey on Drug Abuse* (September 1995).

Drug-Abuse Problems, National Institute on Drug Abuse, at 4 (1987). In addition, a Utah Power and Light study estimated that employees testing "positive" on preemployment drug tests were five times more likely to be involved in a workplace accident than those who tested "negative." [14]

Given the magnitude of the nation's drug- and alcohol-abuse problems, it would be naive to assume that employees in safety-sensitive positions do not abuse drugs or alcohol. In fact, the latest drug-test "positive" figures show otherwise: 6.7 percent of the 3.75 million employees and applicants who were tested for drugs at SmithKline Beecham laboratories in 1995 tested "positive." SmithKline Beecham, *Drug Testing Index* (March 1, 1996). Of more direct relevance and significance, out of more than 784,000 drug tests performed by that one commercial laboratory on safety-sensitive transportation workers, 3.5 percent tested "positive" for illegal drug use. That percentage indicates that *at least* 27,740 individuals in the transportation industry in safety-sensitive jobs who *knew* they were subject to periodic testing *still* tested "positive" for illicit drug use. *Id.*

Furthermore, in a recent national survey of employees, 35 percent of full-time employees surveyed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 43 percent said that drug use in their workplace "seriously affects their ability to get the job done." *Survey of 1,006 Full-Time Employees, Aged 18 and Older, Working Outside of the Home,* Gallup Organization, Princeton, New Jersey, (November 1995). In addition, 59 percent agreed that alcohol abuse is a major workplace problem. *Id.*

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[14] Dennis Crouch, M. Birky, et al., National Institute on Drug Abuse, *A Critical Evaluation of the Utah Power and Light Company's Substance-Abuse Management Program: Absenteeism, Accidents, and Costs,* Drugs in the Workplace: Research and Evaluation Data, at 169-93 (1989).

The devastating effects of alcohol- and drug-impaired employees are evident in several studies. Between 1975 and 1986, more than 50 train accidents were directly attributed to drug or alcohol abuse. These accidents resulted in 37 fatalities, 80 injuries, and more than $34 million in property damage. *Battling the Enemy Within*, Time, March 17, 1986, at 52. Other studies have documented declines in workplace accidents after substance-abuse problems were decreased or eliminated through workplace drug testing. For example, a survey of construction industry companies revealed that where substance-abuse testing was implemented, workplace accidents declined by 34 percent. National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992).

Studies of workers who test "positive" for drug use establish that the costs of workplace substance abuse can be cut following implementation of substance-abuse detection programs. For example, in a retrospective study, the U.S. Post Office estimated that it could have achieved net savings of 105 million dollars within five years by *not* hiring job applicants who tested "positive" on pre-employment drug tests *in one year alone*. United States Postal Service, Personnel Research & Development Branch, Office of Selection and Evaluation, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (July 1992).

Legislators, regulators, and employers have relied on this information and similar data in formulating policies and strategies to protect the public from those well-documented harms. If arbitrators and courts effectively mandate that an employee's refusal to submit to drug testing is sanctioned less severely than a "positive" drug-test result, they will destroy the underlying purposes of these laws, regulations, and policies, and place the public at risk.

D. Reinstatement of a safety-sensitive employee who refused to test sends the wrong signal to courts, arbitrators, employers, and employees regarding a compelling public policy concern.

Reinstatement of Mr. Cash would subvert public policy, and send a jarring signal to employers that work strenuously to achieve the goal of a drug-free workplace, particularly in safety-sensitive environments. Rather than reinforcing the clear and dominant policy direction of government at all levels, the Third Circuit's decision—if undisturbed—will prevent employers from carrying out their legal duties, and securing all potentially affected parties and interests from potentially catastrophic harm. It will condone employee misconduct—refusing to test—and undermine a highly legitimate, widely accepted, and absolutely necessary tool in achieving a crucial social goal.

As the Fifth Circuit recognized in *Exxon Corp. v. Baton Rouge Oil and Chemical Workers' Union, supra*, the compelling public policy against drug use in safety-sensitive positions can be weakened by an arbitrator's reinstatement or back pay order. For that reason, the court concluded that this precise public policy takes compelling precedence over the discretion that the arbitrator ordinarily would have to interpret the collective bargaining agreement. In contrast, the ruling of the Third Circuit in this proceeding improperly subordinates this critical interest, and would serve as an obstacle to the eradication of illicit drug use in safety-sensitive positions. It would improperly insulate employee action at odds with the goals and methodology embraced by the government and private employers, and otherwise tend to perpetuate the very harm which public policy seeks to avoid.

The net effect of the Third Circuit's decision, if widely applied, would be to put and keep *more* drug abusers in safety-sensitive jobs. How can that possibly be a good thing? Our court system should enthusiastically embrace the fundamental concept that drug abusers should *not* be

in safety-sensitive jobs. The courts should—as they generally have—send the right signal to America by not forcing employers to hire or retain those who could do the most harm in those positions.[16]

Workplace drug and alcohol abuse clearly presents unique problems, not only for employers but for society as well. Drug and alcohol abuse repeatedly has been shown to have disastrously harmful effects in the workplace and in the community. Employer practices throughout the country have proven that comprehensive drug-testing programs with known, uniform consequences are the most effective means of preventing the potential harm that employee drug abuse can cause. The effectiveness of drug testing, however, is severely compromised when refusals to submit to testing are sanctioned less severely than are "positive" test results.

Clear tenets of public policy argue against allowing impaired employees and employees who refuse a drug test to perform safety-sensitive jobs. The Institute urges the Court to recognize the commonly understood and accepted components of a drug-testing program, and to allow employers to better protect their employees, the public, the environment, and their business interests. The Court can accomplish this by preserving employers' rights to have meaningful and effective drug-testing programs, and to continue—*as is the practice of virtually all employers*—to consider "refusals-to-test" the equivalent of "positive" drug tests.

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[16] *See, e.g., Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) (arbitrator's reinstatement of employee terminated for sexual harassment vacated due to conflict with and adverse effect upon public policy interests).

CONCLUSION

The Institute for a Drug-Free Workplace respectfully urges the Court to grant the writ of certiorari to review the judgment below, to reverse the rulings that would require the reinstatement of Mr. Cash despite his misconduct and violation of company policy—specifically, his refusal to submit to a drug test—and to recognize that his mandated reinstatement would violate public policy.

Respectfully submitted,

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